No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* 41 FAMILY POLICY ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE[1]

The 41 family policy councils and policy alliances listed below each work within their respective states to preserve religious liberty and rights of conscience from state overreach and government intrusion. They are nonprofits who advocate for free speech, religious liberty, and the rights of the unborn. They pursue their work in court, before legislatures, in governor's mansions, and in the court of public opinion. They are vitally concerned that the decision of the court below undermines a constitutional firewall against compelled speech and will set a precedent permitting states to coerce conformity even from those citizens who dissent from state-mandated orthodoxy on matters of "politics, nationalism, religion, or other matters of opinion." The complete list follows:

The Alaska Family Council, Center for Arizona Policy, Family Council of Arkansas, California Family Council, Capitol Resource Institute, Colorado Family Action, Family Institute of Connecticut, Delaware Family Policy Council, Family Policy Alliance, Family Policy Alliance of Georgia, Hawaii Family Forum, Family Policy Alliance of Idaho, The FAMiLY LEADER of Iowa, Family Policy Alliance of Kansas, The Family Foundation of Kentucky, Louisiana Family Forum, Christian Civic League of Maine, Massachusetts

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[1] Petitioners have submitted a blanket consent to the filing of amicus briefs in this case. Amici have contacted and obtained consent to file this brief from counsel for Respondents. Amici state that no counsel for a party authored this brief in whole or in part, and no person other than the amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Family Institute, Michigan Family Forum, Minnesota Family Council, Montana Family Foundation, Nebraska Family Alliance, Nevada Family Alliance, Cornerstone Action of New Hampshire, New Jersey Family Policy Council, Family Policy Alliance of New Mexico, New Yorkers for Constitutional Freedoms, North Carolina Family Policy Council, NC Values Coalition, Family Policy Alliance of North Dakota, Citizens for Community Values of Ohio, Family Policy Institute of Oklahoma, Pennsylvania Family Council, Palmetto Family Council of South Carolina, South Dakota Family Heritage Alliance, Family Action Council of Tennessee, Texas Values, The Family Foundation of Virginia, Family Policy Institute of Washington, Family Policy Council of West Virginia, and Wisconsin Family Action.

SUMMARY OF ARGUMENT

For the second time in recent months this Court is called upon to consider and rule upon the most egregious form of First Amendment violation — the decision of the state to compel its citizens to express or support ideas they find repugnant.

In the first case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-11, Argued Dec. 5, 2017) the state at least offered the defense that custom design of a wedding cake was not a form of expression protected by the First Amendment. In this case, no such defense is available. In this case, the state knows full well that it is compelling speech, and it knows full well that it is compelling speech on matters of deep moral, religious, and political dispute.

The state here compels pro-life crisis pregnancy centers to advertise the availability of free or low-cost abortions. Given the belief of these pro-life citizens that the unborn child is a separate human life, equal in value to any other living person, the state is requiring these citizens to advertise the availability of free or low-cost means of facilitating death.

These beliefs are the soul motivating the embodied action of pro-life pregnancy centers: their staff and volunteers are moved by a desire to save the lives of unborn children and help mothers choose to give birth. The State of California directly interferes with their work by forcing them to post messages actively opposed to their lifesaving efforts. It is hard to imagine a greater imposition on individual conscience. It is hard to imagine a more repugnant form of forced speech.

And what is the state interest so vital that it permits California to conscript the private speech of pro-life citizens? The state is claiming that it wants to provide accurate information to young women. Women are "unaware of the public programs available to them," declares California. *National Institutes of Family and Life Advocates v. Harris*, 839 F.3d 823, 829 (9th Cir. 2016) (citing Assembly. Bill No. 775 Section 1(b)). Yet the state has enormous resources available to correct this alleged information gap. It can distribute literature, erect signs, run commercials, advertise on social media, and work with sympathetic community groups and activists to spread the word. Its own ability to speak is bounded only by its creativity and its funding.

But that's not enough for the state. It specifically chose to target pro-life pregnancy centers. It chose to use their access to their clients to spread the state's message. Why? Because the state openly and obviously despises the pro-life pregnancy centers' mission and purpose. The legislature explicitly condemns their efforts to "discourage and prevent women from seeking abortions." Assem. Comm. On Health, Analysis of Assembly Bill No. 775 at 3. It claims — without offering any specific findings about petitioners in this case — that pregnancy centers "interfere with women's ability to be fully informed and exercise their reproductive rights." *Id.*

The court below justified its holding that the state could indeed force crisis pregnancy centers to post a notice that California provides "immediate free or low-cost access" to abortion in part by describing the notice as mere "professional speech," as if speech by professionals on matters of public concern were entitled to less constitutional protection than speech by other private citizens.

Yet California's citizens, including professionals operating in their professional capacities, have a constitutional right to discourage women from seeking abortions. They have a constitutional right to remain silent about the availability of state-funded free abortions. They have a constitutional right to make the case for life, including by competently offering medical services that are designed not just to convey the truth about the humanity of the unborn child but also to ease the concerns and burdens of the pregnant mother.

The Ninth Circuit's decision undermines two of the Court's most important precedents, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977). If California has its way, then a "fixed star in our constitutional constellation," will be erased from our nation's sky. *Barnette*, 319 U.S. at 642. No longer will it be the case that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

If this court rules in favor of the respondents, it will send a clear message that, contrary to its former holding in *Barnette,* state governments may settle hotly debated moral questions by legislative fiat, and may compel dissenting citizens to speak in accordance with the government's preferences.

In forcing pro-life citizens to advertise for free or reduced-cost abortions, the state of California is making a demand every bit as intrusive as asking a Jehovah's Witness family to state that they intend to "live free or die." In *Maynard*, the Court squarely addressed the question "of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Maynard*, 430 U.S. at 713. The court found that New Hampshire could not force citizens to turn their private automobiles into a "mobile billboard" for its "ideological message." *Id.* at 715.

Here, the state attempts to transform pro-life pregnancy centers into stationary billboards for a pro-abortion message. It commandeers pro-life citizens' platforms and resources to accomplish the state's pro-choice purpose. It introduces its approval of abortion into the pregnancy centers' relationships with their clients, including many clients who are themselves morally opposed to abortion.

During the *Masterpiece Cakeshop* oral argument, Justice Kennedy rightly noted that "tolerance is essential in a free society. And tolerance is most meaningful when it's mutual." Oral Arg. Tr. 62. Where is the tolerance in California's actions? The state scorns the marketplace of ideas. It rejects the notion that the cure for speech that it deems bad is more speech or better speech. Instead, it seeks to coerce dissenters into spreading the state's message and advancing the state's interests.

If anything, the law at issue here is more pernicious than the laws at issue in *Barnette* and *Maynard*. In those cases, the state was not specifically targeting the speech of Jehovah's Witnesses. The law in this case is specifically crafted to target pro-life citizens, as the legislative record shows. This is not tolerance. It is coercion, and it strikes at the heart of the First Amendment.

ARGUMENT

I. The State of California Is Conscripting Pro-Life Professionals Into its Pro-Choice Cause.

Let us be clear about California's actions in this case. It is using its defense of one constitutional right — the *Roe*-created right to abort a child — as a pretext for diminishing a second constitutional right, the First Amendment-protected freedom of speech. It has made the ideological decision to facilitate abortions even to the point of funding the procedure, and it is now requiring private citizens to communicate the state's ideological decision even when those citizens are strongly and sincerely opposed.

Moreover, the grounds for forcing these pro-abortion communications are thin to the point of pretext, demonstrating both hostility to the pro-life message and hostility to the pro-life messenger. As the Ninth Circuit relates in the decision below, the law was specifically aimed at addressing the alleged sins of pro-life pregnancy centers, but the legislature's indictment — especially when read in light of the statute at issue — is less than damning:

> The Legislature also found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability

> to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.*

Harris, 839 F.3d at 829.

Notably, there is no claim that any person is forced to enter a crisis pregnancy center. There is no claim that crisis pregnancy centers block access to information available through countless alternative sources. Women can do research on the internet, they can walk into other clinics, they can talk to friends and relatives. They can see commercials on television, hear ads on the radio, and talk to other mothers. While there may be women who lack information, it is not for lack of *access* to information.

Moreover, if the state feels that existing information channels are inadequate, it can directly address the deficiency through access to funds and communication outlets that dwarf the financial and media reach of crisis pregnancy centers. Instead, it has chosen to target one of the few spaces in the California community where the pro-life message is presented in a direct manner and in an undiluted form.

The state plainly does not like this pro-life message. It explicitly finds it "unfortunate[ ]" that these pregnancy centers "aim to discourage and prevent

women from seeking abortions." JA 84-85. The state's sweeping, undifferentiated animus is also obvious from its remedy. The statute does not take aim at individual pro-life pregnancy centers for engaging in proven misconduct. Instead, the state of California directs a shotgun blast at all pro-life pregnancy centers by directing them to advertise for free or low-cost abortions.

In other words, every pro-life pregnancy center is compelled to comply even if there is no proof that it has ever confused, misinformed, or intimidated a single client. Nor is the compelled speech an appropriate remedy for the alleged fraudulent behavior. An advertisement for low-cost abortion does nothing to correct the alleged "misimpressions" and "false information" of the clinics. Rather, the problem it redresses is apparently the bare fact that too few abortions are happening in the state of California.

In short, the state's admitted goals and the pro-life pregnancy centers' essential mission are in fundamental opposition. California is attempting to make sure that each and every pregnant woman in the state knows that they possess a right to an abortion and that the state will facilitate access to that right by providing low-cost or no-cost abortions to those who qualify. The pro-life pregnancy center is attempting to teach each client about the value of the human life in her womb and to persuade her to make the choice to deliver that child and either raise him herself or give him up for adoption.

The few medical services provided at pro-life pregnancy centers are provided *for the purpose* of facilitating the mission of the organization: pregnancy

tests inform a woman that she is a mother; ultrasounds provide her with visible and audible proof of her unborn child's existence, heartbeat, and humanity. These are the procedures offered in licensed clinics; and they serve the goal of encouraging a pregnant woman to embrace their own motherhood and choose to protect the precious life growing in her womb.

A pro-life pregnancy center is in many ways comparable to a public interest law firm, where the firm exists not merely to provide legal services but to advance a specific organizational mission and purpose. These firms are of course required by law to represent clients competently and professionally, but they are not for that reason required, as a condition for doing business, to advance any message inconsistent with their special organizational purposes.

The court below justified the state's imposition of special burdens on pro-life pregnancy centers by classifying the speech of these unique pro-life organizations as "professional speech" that enjoys far less stringent constitutional protection than other forms of speech — even to the point of permitting the state to compel speech contrary to the fundamental purpose of their professional activities.

The 9th Circuit, however, seems to confuse any speech uttered by a professional with "professional speech." There is no medical expertise or professional training required to post the state's advertisement. The fact that professionals work at crisis pregnancy centers does not mean that the state's simple notice enjoys any form of special status.

But even if the notice is held to be "professional speech" because it takes place in the context of a potential professional relationship, it is extraordinarily dangerous to presume that such speech should receive a lower level of constitutional protection, especially given the special status of professionals in public debate. In other words, professionals can and often should serve as advocates, even while providing professional services.

A ruling that renders all speech that occurs in a professional context a less-protected form of quasi-commercial speech (even when, as in this case, no money changes hands) opens Pandora's Box. Often the most effective advocates in the most contentious and consequential public controversies are professionals. Lawyers represent their clients and make arguments in the public square. Doctors and nurses present their own arguments — and are countered by other medical professionals who have reached different conclusions, often according to different value systems.

The so-called learned professions, *acting in their professional capacities*, are among our most valued participants in the marketplace of ideas. It is one thing to require professionals to exercise due care and competence in the provision of their services. It is another thing entirely to draft them to advance the ideological priorities of an activist state. By requiring pro-life professionals to advertise for free abortions, the state uses its immense power to undermine the very purpose of their professional work.

II. California Is Transforming Private Pro-Life Property Into Billboards for the Pro-Choice Cause

While *Barnette* is perhaps the seminal compelled speech case in Supreme Court history, *Maynard* should control. In *Maynard*, as this Court no doubt recalls, the State of New Hampshire required its citizens to equip noncommercial vehicles with license plates that proclaimed the state motto, "Live Free or Die." Jehovah's Witness citizens George and Maxine Maynard understandably objected to the use of their private property (in this case, their car) to advance a message that directly contradicted their religious beliefs.

Maynard framed his objection simply. He declared that he "refuse[d] to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Maynard*, 430 U.S. at 713. It is against that backdrop that this Court framed the case as determining "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.*

In its opinion, the Court noted that the First Amendment of course protects "both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. New Hampshire "force[d] an individual, as part of his daily life — indeed constantly while his automobile is in public view — to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

In *Maynard*, just as in the present case, the state's purpose and the citizen's ideology were in direct conflict. The state wanted to promote "history, individualism, and state pride." *Id.* at 716. These citizens, however, did not share those values — or, to the extent they shared some of those values, they did not prioritize them as the state wished.

Nothing prevented the state from broadcasting its motto far and wide. Nothing prevented New Hampshire from making its motto a default option on license plates, so that the vast majority of citizens might serve as "mobile billboards" for its message without a moment's complaint. This Court ruled that the state could not, however, intrude upon what this Court called the "individual freedom of mind" to accomplish its purposes. *Id.* at 714.

If anything, the state measure in this case is even more intrusive. Pro-life professionals, as part of their daily lives, are forced not only to be messengers for an ideological point of view (that it is appropriate for the state to provide abortion access) but even to abet a course of *action* (calling the listed phone number) that can culminate in the death of an unborn child — the very thing that pro-life pregnancy centers exist to prevent.

The citizens of California — acting through their elected representatives — have chosen to use state resources to fund and facilitate abortion access. A mere 200 crisis pregnancy centers exist across the length and breadth of America's most populous state. They represent a point of view that lacks political power or legislative influence.

But popularity is not the measure of constitutional propriety. In *Maynard* the court held that the First Amendment "protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

Here, California commands that pro-life pregnancy centers not merely foster an idea, but cooperate in enabling a course of action which they find morally objectionable. This issue has been considered and decided by this Court in cases that have come before. The government of California simply does not possess the authority to compel its citizens to speak its message. Let it make its own case to the people of the state.

III. California's Intolerance Threatens to Exacerbate American Cultural Divide

There is no question that questions and debates about abortion are among the most emotional and divisive of all the questions that dominate American public life. Tens of millions of orthodox religious believers look at sacred texts that define life's beginning in the womb and feel both shock and horror that American law grants a right intentionally to kill a child. Many millions have examined the scientific facts of human growth and development and have determined that an unborn child is, in fact, a separate human life, and there is no rational basis for depriving it of the legal protections all other people enjoy.

Others, of course, have studied the issue of abortion and have come to a different conclusion. They view the unborn child as an extension of the mother, part of the

body that she controls. On this view, the unborn child is not human life but rather "potential life," and the right of abortion is indispensable to human autonomy and the liberation of women from traditional, subservient cultural status.

While the Founders could not anticipate the contours of an abortion debate that fully emerged almost two centuries after they drafted the Constitution and Bill of Rights, they could and did anticipate the enduring existence of debate and dissent over the most contentious of public controversies. After all, the founding generation was immersed in debates as consequential as the morality and legality of chattel slavery, an issue that would ultimately divide the United States and trigger our nation's deadliest military conflict.

No less a thinker than the great abolitionist Frederick Douglass expressed the view that free speech was "the great moral renovator of society and government." Frederick Douglass, "A Plea For Freedom of Speech in Boston" (Dec. 9, 1860). He blamed the persistence of slavery, in part, on the *lack* of free speech in antebellum America. "Slavery cannot tolerate free speech," he said. "Five years of its exercise would banish the auction-block and break every chain in the South." *Id.* Free speech is the "dread of tyrants. It is the right which they first of all strike down." *Id.*

Free speech threatens power. Free speech on matters of deep and profound public concern threatens power all the more. That is why — when given the opportunity — the powerful will seek to confine, limit, or (as in this case) coerce dissenting speakers. And that is why Justice Kennedy was right in his observation

during the *Masterpiece Cakeshop* oral argument when he asserted that "tolerance is essential in a free society. And tolerance is most meaningful when it's mutual." (Oral Arg. Tra. 62) A society in which pro-life clinics are constrained to direct women to a means of obtaining abortions is a society made less free.

Intolerance does not settle debates, it magnifies divisions. Intolerance does not create cultural or intellectual conformity, it generates seething resentment. In this case, California is demonstrating that it is so intolerant of disagreement that it will commandeer the speech of the most effective dissenters, the people who work most closely with young women who seek alternatives to abortion, the mothers who want to choose life.

A tolerant state is not an impotent state. California can and does deploy immense resources to advance its state interests. If it chose, it could deploy even more resources and flood targeted communities with its favored messages. It can properly punish medical professionals who violate standards of care. In other words, if California is made to protect the constitutional rights of pro-life citizens, it will not lack for pro-choice messages – or the resources to make those messages heard.

It is time for California to be tolerant. It is time for California to respect the liberties of all its citizens, including those citizens who stand opposed to its policies. Its coercion defies precedent. It cannot be allowed to stand.

CONCLUSION

Compelled speech is not the answer to cultural conflict. This court must not render professionals second-class citizens with diminished constitutional rights. It must not upset generations of case law protecting the "individual freedom of mind." *Maynard*, 430 U.S. at 714. There are few state actions more repugnant to the consciences of sincere, pro-life citizens than demanding that they advertise free or low-cost access to the deadly procedure they work so mightily to oppose. The judgment of the court below must be reversed.

Respectfully submitted,

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